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CITATIONS

350-153—69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC., DISSTON DIVISION—DANVILLE WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL–CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The court of appeals rendered no opinion in enforcing the Board's supplemental order. The earlier opinions of the court of appeals are reported at 363 F. 2d 272 (certiorari denied, 385 U.S. 851), and 389 F. 2d 295 (Pet. App. 14–31). The Board's decisions and orders are reported at 172 NLRB 72 (Pet. App. 31–38) and 153 NLRB 1370.

JURISDICTION

The judgment of the court of appeals (Pet. App. 39–40) was entered on April 22, 1969. The petition for

a writ of certiorari was filed on June 13, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon finding that the employer's refusal to agree to the union's request for a contract provision for the checkoff of union dues was not in good faith but solely to frustrate an agreement with the union, the National Labor Relations Board properly ordered the employer to grant such a provision as a remedy for the unfair labor practice.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition, pp. 41–42.

STATEMENT

A. THE EARLIER PROCEEDINGS

In the fall of 1961, the Union[1]—which had just been certified as the representative of the employees at the Company's Danville, Virginia, plant—commenced contract negotiations with the Company. The parties met 28 times but failed to reach agreement. Upon charges filed by the Union, the Board found that the Company had failed to bargain in good faith by, *inter alia,* refusing to agree to an arbitration provision while insiting upon a no-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times. The Board or-

[1] The United Steelworkers of America, AFL–CIO.

dered the Company to cease its illegal conduct and to bargain in good faith. On July 17, 1964, the Court of Appeals for the Fourth Circuit summarily enforced the Board's order (J.A. 46).[2]

Meanwhile, negotiations had resumed in October 1963. Twenty-one meetings were held between that date and September 10, 1964, when negotiations again ceased without an agreement (J.A. 47; 13–14, 44). When negotiations broke off, the issues left unresolved were wages, insurance, and the Union's request for a deduction of Union dues by the Company from employees' paychecks ("checkoff") (J.A. 47; 14–15). The dues checkoff was discussed at virtually every bargaining session, and each time the Company refused the Union's request, claiming that collection of dues was the "union's business" (J.A. 47; 17, 27–28). Although the Union offered to withdraw its checkoff request if the Company would permit the Union to collect dues during non-working hours in non-working areas of the plant, the Company also rejected this alternative proposal on the ground that it refused "to aid and comfort the International at this location" (J.A. 47; 16–17, 29–30, 33–35). The Union again filed unfair labor practice charges with the Board.

At the Board hearing, the chief negotiator for the Company admitted that the refusal of a checkoff was not based on "inconvenience to the Company," since it regularly made payroll deductions for Savings Bonds, Insurance, United Givers Fund, and a "Good Neighbor Fund" (J.A. 48; 25–28, 44). He also stated

[2] "J.A." refers to the Joint Appendix to the briefs below.

that the Company had no policy against checkoffs, and that it had agreed to checkoff provisions with unions at some of its other plants (J.A. 48; 25, 28).

The Board concluded that the Company had failed to bargain in good faith about the dues checkoff, adopting the trial examiner's finding that the Company's intransigent position was motivated by a desire to frustrate agreement with the Union (J.A. 49–51, 58). The Board again ordered the Company to cease and desist from the unfair labor practice found, and to bargain collectively with the Union upon request (J.A. 52–53, 58–59). In May 1966, the Court of Appeals for the District of Columbia Circuit[3] sustained the Board's unfair labor practice finding, and enforced its order. 363 F. 2d 272. The court found that it was not necessary for the order to include a specific reference to checkoff, stating that, in view of the finding that the Company's refusal was for the purpose of frustrating agreement with the Union, "[t]o suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (363 F. 2d at 276, n. 16). This Court denied the Company's petition for a writ of certiorari. 385 U.S. 851.

B. THE PRESENT PROCEEDING

When the contract negotiations were resumed, each side urged a different interpretation of the court of appeals' decree. The Company contended that the de-

[3] Judge Wilbur K. Miller dissented from this and the subsequent decisions of the court of appeals in this case.

cree left it free to continue to refuse a checkoff provision provided it was willing to bargain about alternative methods of dues collection. The Union, on the other hand, asserted that the Company was obligated to agree to such a provision (Pet. App. 17–18).

In February 1967, the Union moved in the court of appeals for clarification of the enforcement decree (Pet. App. 18–19). The court initially denied the motion, suggesting that contempt proceedings would be appropriate to test the Company's compliance with the decree (Pet. 6; Pet. App. 18). When the Board declined to institute contempt proceedings, the court granted the Union's renewed motion, and remanded the case to the Board for reconsideration of its order in light of the principles announced in the court's opinion. The court stated that it did not read "Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a)(5) duty, to make meaningful and reasonable counteroffers, or indeed even to make a concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position" (Pet. App. 21). The court pointed out that, "[s]ince the company had conceded that it had no business reason for refusing the checkoff, it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurance—the two issues besides checkoff that remained in dispute. Indeed, it is possible that in an appropriate case the Board could simply order the company to grant a checkoff" (Pet. App. 22).

On remand, the Board concluded in accordance with the court's rationale that an order requiring the Company to grant a checkoff was warranted in the circumstances of this case (Pet. App. 34). The Board determined that, in light of the unlawful purpose of the Company's refusal to agree to a checkoff provision, the Company should not be permitted to persist in its refusal in order to extract concessions from the Union on other issues (*ibid.*). Accordingly, the Board entered a supplemental order which included a requirement to grant a checkoff (Pet. App. 35–36). The court of appeals enforced that order (Pet. App. 39–40).

ARGUMENT

1. The facts summarized above show that on two separate occasions the Company failed to bargain in good faith with the Union. In the second unfair labor practice proceeding, the Board found and the court of appeals agreed that the Company's refusal to grant a checkoff was not based on legitimate business considerations, but was solely "for the purpose of frustrating agreement with the union * * *" (Pet. App. 17). The sole question presented is whether, in these unique circumstances, the Act empowers the Board, as a remedy for the Company's continuing refusal to bargain in good faith, to direct the inclusion of a checkoff provision in any agreement reached between the Company and Union. We submit that the court below correctly answered this narrow question in the affirmative.

As petitioner recognizes (Pet. 8–9), Section 10(c) of the Act empowers the Board, upon finding that an

unfair labor practice has been committed, to require the employer to "take such affirmative action * * * as will effectuate the policies of the Act." And, as this Court stated in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, the "Board's power is a broad discretionary one, subject to limited judicial review," and the "Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act'" (*id.* at 216). The Board's remedy in this case is within these limits. Since the Company's refusal to grant a checkoff was motivated solely by a desire to frustrate agreement with the Union, the court below correctly observed that "to permit the company to refuse a checkoff for some concocted reason not heretofore advanced would make a mockery of the collective bargaining required by the statute" (Pet. App. 17). In these circumstances, the Board could reasonably conclude that the effects of the Company's prior refusal to bargain could be fully eradicated only by requiring that it now grant the Union a checkoff provision.[4] As the court below said, "if the Board can do no more than repeatedly order the company to bargain in good faith, the workers'

[4] As this Court recently observed in an analogous situation: "If the Board could enter only a cease-and-desist order and direct an election * * * it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain' * * *. The employer could continue to delay * * * and put off indefinitely his obligation to bargain * * *." *National Labor Relations Board* v. *Gissel Packing Co.*, Nos. 573, et al., Oct. Term, 1968, decided June 16, 1969, slip opinion, pp. 32–33.

rights to bargain collectively may be nullified. The Board is empowered to see that this does not happen" (Pet. App. 28).

2. Contrary to petitioner's contention (Pet. 9–11), the Board's order does not violate the provision in Section 8(d) of the Act that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." As the court below pointed out (Pet. App. 21), Section 8(d) relates to "*whether* a Section 8[(a)](5) violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred." Once the failure to bargain in good faith has been determined, the formulation of an order to remedy the effects of the unfair labor practice is governed by the policies which underlie Section 10(c) of the Act. The remedial order in this case did not interfere with any freedom to contract protected by the Act. As the Board correctly observed on remand (Pet. App. 34–35):

> To permit Respondent to hold out for some "reasonable concession" by the Union in return for the checkoff requirement would imply that the Respondent is now being ordered to surrender a position that it had legitimately maintained. Such an implication would be contrary to our finding, affirmed by the court of appeals, that Respondent's opposition to granting checkoff was based solely on a desire to thwart the consummation of a collective-bargaining agreement. * * *

National Labor Relations Board v. *Insurance Agents' International Union*, 361 U.S. 477, is fully

consistent with this analysis. As this Court there pointed out, Section 8(d) was designed to insure that the Board would not weigh the merits of each party's proposals, offers, or counteroffers in determining whether the bargaining was in good faith (*id.*, at 486–487). The Board in this case did not engage in the forbidden task of assessing the merits of the parties' substantive proposals; it merely determined what action was necessary to remedy the Company's unlawful refusal to bargain. Cf. *National Labor Relations Board* v. *C & C Plywood Corp.*, 385 U.S. 421, 427. And see *Forced Concession as a Possible NLRB Remedy*, 68 Colum. L. Rev. 1192 (1968). That the Company is required to make a concession concerning checkoff is not attributable to any judgment by the Board that a checkoff is beneficial in this particular labor-management relationship, but rather to the fact that the Company's prior bad faith bargaining on that issue could be fully eradicated only by such remedy.[5]

[5] The other cases cited by petitioner (Pet. 11) are also inapposite. *National Labor Relations Board* v. *American Aggregate Co.*, 335 F. 2d 253 (C.A. 5), *National Labor Relations Board* v. *Lewin-Mathes Co.*, 285 F. 2d 329 (C.A. 7), and *National Labor Relations Board* v. *United Clay Mines Corp.*, 219 F. 2d 120 (C.A. 6) all involve the evidentiary determination whether an employer's bargaining was in bad faith. *Retail Clerks International Ass'n* v. *National Labor Relations Board*, 373 F. 2d 655 (C.A. D.C.), involved the factual question whether an agreement had been reached by the employer and union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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